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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 163

THE CLEVELAND TRUST COMPANY AND A. DEAN PERRY, EXECUTORS OF THE ESTATE OF HELEN WADE GREENE, DECEASED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court granting the government's motion for summary judgment on the procedural issues (Pet. App. 4-21) is reported at 266 F. Supp. 824. The court of appeal's order denying the estate's motion for an interlocutory appeal as to those issues (Pet. App. 22) is not reported. The opinions of the district court on the substantive issue (Pet.

App. 23-31, 31-37) are not reported. The opinion of the court of appeals (Pet. App. 37-53) is reported at 421 F. 2d 475.

JURISDICTION

The judgments of the court of appeals were entered on January 23, 1970 (Pet. App. 54), and on February 19, 1970, the court of appeals denied the estate's petition for rehearing (Pet. App. 54-55). The petition for a writ of certiorari was filed on May 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the district court erred in directing a verdict that decedent's transfer of property in trust was not made in contemplation of death within the meaning of Section 2035 of the Internal Revenue Code.

2. Whether the court of appeals correctly held that the district court erred in admitting evidence relating to decedent's post-gift health and the sudden and unexpected nature of her death.

3. Whether both courts below correctly held (a) that the Internal Revenue Service was not required to identify the error for which an informal conference recommendation with the estate was rejected; (b) that the rejection of the informal conference recommendation did not violate the Administrative Procedure Act; and (c) that the government was not equitably estopped from rejecting the informal conference recommendation.

STATUTES AND REGULATION INVOLVED

Sections 2035(a), 7121, and 7122 of the Internal Revenue Code and Section 20.2035-1 of the Treasury Regulations on Estate Tax are set out in the Appendix, *infra*, pp. 13-16.

STATEMENT

On August 15, 1957, decedent transferred property valued at more than $1.3 million to an irrevocable trust, which provided for payment of the trust income to her daughter for life, with the remainder to be distributed to decedent's grandchildren (R. 269-270, 274-275, 567-571).[1] Approximately 16 months later, on December 25, 1958, decedent died at the age of 74 (R. 260, 366). On the same day that she executed the irrevocable trust instrument, decedent also revised two other instruments—her will and a separate revocable trust—all three instruments having similar dispositive provisions (R. 275-277, 533-541). The revocable trust was admittedly taxable as part of decedent's gross estate (R. 276). The funds with which the irrevocable trust here in question was established came directly from the corpus of the revocable trust (R. 270).

Decedent was familiar with matters of finance and taxation, and reviewed quarterly statements of the family assets and liabilities, including lists of stocks owned (R. 278-288). Decedent knew that the money

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[1] "R." references are to the separately bound joint appendix filed in the court of appeals which has been lodged with this Court.

in the revocable trust would be taxable in her estate, and also that after her death the irrevocable trust might be considered to be a gift in contemplation of death (R. 279). The attorney who drafted the trust instruments for decedent made estimated estate tax computations reflecting estate taxes payable both with and without the inclusion of the irrevocable trust funds (R. 247-249, 280).

This controversy centers on the question whether decedent's transfer of property to the irrevocable trust was a gift made in contemplation of death within the meaning of Section 2035 of the Internal Revenue Code. The parties initially attempted to settle the controversy through the use of the informal conference procedures prescribed in Section 601.105(c)(3) of the Internal Revenue Service's Statement of Procedural Rules. An informal conference was held on November 28, 1961, between counsel for the estate and representatives of the Service (R. 170), in accordance with customary procedures (Rev. Proc. 60-24, 1960-2 Cum. Bull. 998), and on December 26, 1961, the estate offered to compromise the proposed liability (R. 62, 64, 172). The estate's offer, submitted on Treasury Form 890-B, stated that it did not constitute a final closing agreement under Section 7121 of the Code, and did not, therefore, preclude the assertion of a further deficiency if it was subsequently determined that additional tax was due (R. 56-59). It was supplemented by a "Collateral Agreement" which stated that the settlement proposal was subject to review and approval by or on behalf of the Commissioner of Internal Revenue (R. 60-61, 172).

The offer proposed that the Service would not raise the contemplation of death issue in return for the estate's agreement to certain upward adjustments in the valuation of its assets, which would increase the estate's tax liability by $77,781.53 plus interest (R. 58-59). The estate paid this amount on January 3, 1962, prior to its assessment on January 19, 1962, and prior to final action on the proposal (R. 64, 76, 172).

The informal conferee representing the Service recommended acceptance of the estate's proposal, but, upon review, his recommendation was overruled. Counsel for the estate were advised in a conference held on April 2, 1962, that the settlement proposal had been rejected in part (R. 62, 173) and that it was free to withdraw its proposed concessions or to modify them (R. 62). Although counsel were informed that another opportunity for an informal conference would be afforded if requested (R. 62, 71, 173), no further conference was requested, and counsel instead asked for additional time to determine what procedure would be followed (R. 62-65). Correspondence ensued between counsel and the District Director (R. 71-72, 73-74), the Regional Commissioner (R. 66-68, 69-70, 145-161, 167-168), the Appellate Division (R. 89, 92, 93-97), and the Commissioner of Internal Revenue (R. 75-81, 82-84, 85-88, 90, 91). The District Director and the Commissioner thereafter notified counsel that the recommendation of the informal conferee had been overruled for "clearly defined error having a substantial effect on the tax liability" (R. 83, 86, 180), and it was stated

that the clearly defined error was the failure to give proper application to the legal presumption in favor of the government, as provided by Section 2035 of the Code, in view of the evidence indicating testamentary motives (R. 86).

After issuance of a statutory notice of deficiency (R. 93-97), the estate paid the tax in dispute (R. 34), and after its claim for refund was denied, it brought this suit for refund (R. 11-19, 464). Counts II, III and IV of the estate's complaint alleged that (1) the Internal Revenue Service had failed to follow its informal conference procedure; (2) the Internal Revenue Service had violated the Administrative Procedure Act; (3) the government was estopped to repudiate the alleged informal conference "agreement" and to assess the tax (R. 14-18). On November 29, 1966, the district court sustained the government's motion for summary judgment dismissing counts II, III and IV of the complaint (R. 38-54; Pet. App. 4-21). The court of appeals affirmed (Pet. App. 37-53).

The contemplation of death issue was first fully tried before a jury in April 1967, but the jury was unable to reach a verdict and a mistrial was declared (R. 7, 219). On retrial, the district court directed the jury to return a verdict for the estate (Pet. App. 31-37), and judgment was entered in accordance with the verdict (R. 460-461). The court of appeals reversed and remanded the cause for a new trial (Pet. App. 37-43, 51).

ARGUMENT

The decision below is correct. There is no conflict or any other basis for further review.

1. The court of appeals correctly held that the trial court committed reversible error by directing the jury to return a verdict for the estate. The record shows there was ample evidence to support a jury finding that the transfer in issue was in contemplation of death, because it was part of a testamentary disposition, and because the dominant motive for the transfer was avoidance of estate taxes.[2] That the transfer was part of decedent's over-all testamentary plan is shown by the simultaneous execution of the final versions of decedent's will, the revocable trust, and the irrevocable trust, the dispositive provisions of which were strikingly similar (R. 274-277, 533, 567, 604). Their simultaneous execution and substantially identical dispositive provisions, considered with decedent's age, her affectionate family relationships, and the fact that the gift was not essential to her daughter's welfare at that time, would have supported a finding that the transfer was made in contemplation of death (R. 358, 360-364, 366, 372). Such a finding also could have been made from the evidence of decedent's awareness of the taxability of the revocable trust and of the potential tax liability of the irrevocable trust (R. 279-280, 287-288, 301-302, 307-309). This awareness, coupled with decedent's failure to declare any

[2] See Section 2035 of the Internal Revenue Code, Appendix, *infra*, p. 13; Treasury Regulations on Estate Tax, Section 20.2035-1, Appendix, *infra*, pp. 15-16.

motive for the creation of the irrevocable trust (R. 279-281) and her general familiarity with matters of finance and taxation (R. 278-288), could have led a jury to infer that decedent created the irrevocable trust for the principal purpose of saving estate taxes. *Farmers' Loan & Trust Co.* v. *Bowers*, 98 F. 2d 794 (C.A. 2), certiorari denied, 306 U.S. 648.

Where, as here, the evidence is such that conflicting inferences can be drawn therefrom, the resolution thereof should be for the jury rather than the trial court. *Commissioner* v. *Duberstein*, 363 U.S. 278, 290-291; *Baker* v. *Texas & P. R. Co.*, 359 U.S. 227, 229; *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35. The court of appeals' decision to this effect does not create an issue worthy of review by this Court.

2. Nor is there any basis for further review of the court of appeals' holding (Pet. App. 50-51) that the admission of evidence of decedent's health after the transfer, and of the unexpected nature of her death, was erroneous. The government stipulated that decedent was not fearful of imminent death at the time of the transfer and that her death was unexpected. Its theory of the case, in line with settled case law,[3] was that the transfer was in contemplation of death because it was a substitute for a testamentary disposition and was designed to avoid estate taxes. Given

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[3] See, *e.g.*, *United States* v. *Wells*, 283 U.S. 102, 116-117; *Allen* v. *Trust Co. of Georgia*, 326 U.S. 630, 634, n.3; *In re Kroger's Estate*, 145 F. 2d 901, 907 (C.A. 6); *Cronin's Estate* v. *Commissioner*, 164 F. 2d 561 (C.A. 6); see also, 3 Mertens, *Law of Federal Gift & Estate Taxation*, Sec. 22.73, pp. 223-224.

the stipulation and the established rule that, in a contemplation of death case, the primary focus should be on the decedent's state of mind at and before making the gift,[4] the challenged evidence tended to be prejudicial.

3. The contention (Pet. 6, 16-18) that the Internal Revenue Service failed to follow its published procedures is legally irrelevant and factually incorrect. As the court of appeals explained (Pet. App. 46-47), the Service is in no way bound by a settlement recommendation, which is not a statutory closing or compromise agreement under Section 7121 or 7122 of the Code, Appendix, *infra*, pp. 13-14. Nor is it bound, despite the procedural rules, to identify the error for which an informal conference recommendation is rejected. These rules, it has uniformly been held, are directory only, not mandatory. See *Geurkink* v. *United States*, 354 F. 2d 629 (C.A. 7); *Luhring* v. *Glotzbach*, 304 F. 2d 560 (C.A. 4). The Service did in fact, adequately identify the error, even though it was not required to do so. It advised the estate that, in view of the evidence indicating testamentary motivation, the informal conferee had failed to give proper application to the statutory presumption of Section 2035 that gifts made within three years of death are gifts in contemplation of death. The record confirms (R. 83, 86) that the estate was informed of the basis of the clearly defined error.

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[4] See, *e.g.*, *United States* v. *Wells*, *supra* at pp. 113, 117, 119-120; *Cronin's Estate* v. *Commissioner*, *supra* at pp. 564-565; *English* v. *United States*, 270 F. 2d 876, 881 (C.A. 7).

Petitioner's reliance on the Administrative Procedure Act (Pet. 7, 16-18) is misplaced. That Act specifically excepts from its application "any matter subject to a subsequent trial of the law and the facts de novo in any court." Since the question of the estate's tax liability was subject to a trial de novo in a court, the requirements of the Act are inapplicable. See Pet. App. 48.

Finally, there is no merit to the estate's claim (Pet. 7, 17) that the Internal Revenue Service is estopped to deny the validity of the informal conference recommendation because it accepted the benefit of the estate's offer, contained in the Collateral Agreement, of a proposed higher basis for certain assets of the estate and the payment of additional estate taxes reflecting the higher basis. The estate's offer was never accepted by the Service. When it was rejected, the estate was notified that it could withdraw the Collateral Agreement, but it failed to do so. This affords no basis for equitable estoppel against the government. See *Utah Power & Light Co.* v. *United States*, 243 U.S. 389; *Joyce* v. *Gentsch*, 141 F. 2d 891 (C.A. 6). Nor can the government be estopped with respect to the contemplation of death issue by the estate's voluntary payment of taxes relating to an entirely different issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1970.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2035. TRANSACTIONS IN CONTEMPLATION OF DEATH.

(a) *General Rule.*—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.

* * * *

SEC. 7121. CLOSING AGREEMENTS.

(a) *Authorization.*—The Secretary or his delegate is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

(b) *Finality.*—If such agreement is approved by the Secretary or his delegate (within such time as may be stated in such agreement, or later agreed to) such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) the case shall not be reopened as to the matters agreed upon or the agreement modified by any officer, employee, or agent of the United States, and

(2) in any suit, action, or proceeding, such agreement, or any determination, as-

sessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

SEC. 7122. COMPROMISES.

(a) *Authorization.*—The Secretary or his delegate may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) *Record.*—Whenever a compromise is made by the Secretary or his delegate in any case, there shall be placed on file in the office of the Secretary or his delegate the opinion of the General Counsel for the Department of the Treasury or his delegate, with his reasons therefor, with a statement of—

(1) The amount of tax assessed.

(2) The amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise.

Notwithstanding the foregoing provisions of this subsection, no such opinion shall be required with respect to the compromise of any civil case in which the unpaid amount of tax assessed (including any interest, additional amount, addition to the tax, or assessable penalty) is less than $500.

Treasury Regulations on Estate Tax (1954 Code) (26 C.F.R.):

§ 20.2035-1 *Transactions in contemplation of death*

(a) *In general.* A decedent's gross estate includes under section 2035 the value of any interest in property transferred by a decedent in contemplation of death within 3 years before his death, except to the extent that the transfer was for a full and adequate consideration in money or money's worth * * *. With the exception noted in the preceding sentence, the decedent's gross estate includes as a transfer in contemplation of death the value of any interest in property transferred within 3 years before the decedent's death, unless the transfer is shown not to have been made in contemplation of death. The result is not affected by the fact that at the time of the transfer the decedent parted absolutely and immediately with his enjoyment of and title to the property.

(b) *Application of other sections.* If a decedent transfers an interest in property or relinquishes a power in contemplation of death, the decedent's gross estate includes the property subject to the interest or power to the extent that it would be included under section 2036, 2037, or 2038 if the decedent had retained the interest or power until his death. If a decedent exercises or releases a general power of appointment in contemplation of death, the property subject to the power is included in the decedent's gross estate to the extent provided in section 2041 and the regulations thereunder.

(c) *Definition.* The phrase "in contemplation of death", as used in this section, does not have reference to that general expectation of death such as all persons entertain. On the other hand, its meaning is not restricted to an apprehension that death is imminent or near. A transfer "in contemplation of death" is a disposition of property prompted by the thought of death (although it need not be solely so prompted). A transfer is prompted by the thought of death if (1) made with the purpose of avoiding death taxes, (2) made as a substitute for a testamentary disposition of the property, or (3) made for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized in order to determine whether or not such thought prompted the disposition.

(d) *Presumptions.* Any transfer of an interest in property, relinquishment of a power, or exercise or release of a general power of appointment by a decedent within a period of 3 years ending with the date of his death is deemed to have been made "in contemplation of death", unless shown to the contrary. No transfer, relinquishment, exercise, or release made by a decedent more than 3 years before his death is treated as having been made "in contemplation of death".

* * * *